

IN THE SUPREME COURT OF MISSOURI

SCHWARZ PHARMA, INC., n/k/a UCB,)	
INC.,)	
)	
Relator,)	Case No. SC93522
)	
v.)	Missouri Court of Appeals, Eastern
)	District No. ED99885
THE HONORABLE DAVID L. DOWD,)	
JUDGE, CIRCUIT COURT OF ST. LOUIS)	Circuit Court of St. Louis City
CITY, MISSOURI)	Cause No. 1222- CC10229 (Pullen)
)	
Respondent.)	

**REPLY BRIEF OF RELATOR
SCHWARZ PHARMA, INC., n/k/a UCB, INC.**

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

Table of Authorities.....	ii
Statement of Facts	1
Argument	3
Relator Timely Raised, and Incorporated into the Record, the Argument that it had Sixty Days from Service of any Petition Upon it to Move for Transfer.	3
Respondent Incorrectly Explains the Standard for Granting a Writ of Prohibition.	6
Conclusion	8
Certification	9
Certificate of Service	10

TABLE OF AUTHORITIES

	Page(s)
<u>Missouri Statutes and Rules</u>	
Missouri Rule of Civil Procedure 51.045	1, 3, 5
RSMo § 347.069	1
RSMo § 508.010	1
RSMo § 508.010.10	1
<u>Cases</u>	
<u>Howard v. City of Kansas City</u> , 332 S.W.3d 772 (Mo. 2011)	4
<u>State ex rel. Vee-Jay Contracting Co. v. Neill</u> , 89 S.W.3d 470 (Mo. 2002)	3
<u>Norden v. Friedman</u> , 756 S.W.2d 158 (Mo. 1988)	4
<u>State ex rel. Carver v. Whipple</u> , 608 S.W.2d 410 (Mo. banc 1980)	6
<u>Hendershot v. Minich</u> , 297 S.W.2d 403 (Mo. 1956)	5
<u>State ex rel. KCP & L Greater Mo. Operations Co. v. Cook</u> ,	
353 S.W.3d 14 (Mo. Ct. App. W.D. 2011)	6
<u>Chilton v. Gorden</u> , 952 S.W.2d 773 (Mo. Ct. App. S.D. 1997)	5
<u>Frein v. Madesco Inv. Corp.</u> , 735 S.W.2d 760 (Mo. Ct. App. 1987)	4
<u>Stenger v. Great Southern Sav. & Loan Assoc.</u> ,	
677 S.W.2d 376 (Mo. Ct. App. 1984)	4
<u>Sams v. Green</u> , 591 S.W.2d 15 (Mo. Ct. App. 1979)	5
<u>Jones v. Church</u> , 252 S.W.2d 647 (Mo. Ct. App. 1952)	4

Statement of Facts

Relator Schwarz Pharma, Inc. n/k/a UCB, Inc. (“Schwarz”) stands on the Statement of Facts in Relator’s Brief in Support of a Permanent Order Prohibiting Respondent from Enforcing his Order Denying Relator’s Motion to Transfer, which was filed on October 15, 2013. The key facts in this matter are:

- Relator was first served with any petition related to Phillip Pullen and Beverly Jo Collins-Pullen’s claims on October 2, 2012, when Relator was served with the previously severed—and therefore inoperative—Second Amended *Anderson* Petition. **A173-A175.**
- On October 3, 2012, Plaintiffs Phillip Pullen and Beverly Jo Collins-Pullen filed their Individual Petition in accordance with the severance order. Relator was served with the Plaintiffs’ Individual Petition on October 4, 2012. **A176-A214.**
- On November 15, 2012, Relator filed a Motion to Transfer for Improper Venue under RSMo. §§ 508.010 and 347.069(a), and Missouri Rule of Civil Procedure 51.045. **A218-A223.**
- On January 25, 2013, Respondent Judge David L. Dowd heard oral argument on the Motion to Transfer Venue. **A495.** Relator argued that the November 15, 2012 Motion to Transfer was timely because Relator, who was not a party to the *Anderson* case until October 2, 2012 at the earliest, had until December 3, 2013, to move to transfer.
- On April 3, 2013 Relator submitted a Motion to Enforce Transfer Pursuant to RSMo. 508.010.10. **A551.** That same day, at the hearing on the Motion to

Enforce Transfer, Relator again reminded Respondent that the November 15, 2012 Motion to Transfer was timely because Relator had until December 3, 2013, to move to transfer.

- On April 5, 2013, Respondent denied the Motion to Transfer and the Motion to Enforce Transfer on the lone ground that “Defendants’ motion to transfer was not called up for hearing by Defendants at any time within ninety days after it was filed.” **A2.**¹

¹ In its Brief, Petition for Preliminary Writ of Prohibition, and Reply to Respondent’s Opposition to Preliminary Writ of Prohibition, Relator fully addressed the fact that the basis for Respondent’s Order—that Relator failed to call its motion for hearing and the motion was not heard—is belied by the record and does not supply a reason for denying Relator’s Motion to Transfer. Respondent has apparently abandoned this initial rationale for denying Relator’s Motion to Transfer this case. **A611, A666.** Respondent now takes the position that the motion was called and heard, but that Relator waived its argument that it had sixty days from service of any pleading upon it to move to transfer because Relator failed to properly raise the argument and make it part of the record before Respondent. Therefore, in this Reply, Relator will ignore the holding in Respondent’s order denying transfer and will address only the arguments set forth in Respondent’s Brief.

ARGUMENT

I. RELATOR TIMELY RAISED, AND INCORPORATED INTO THE RECORD, THE ARGUMENT THAT IT HAD SIXTY DAYS FROM SERVICE OF ANY PETITION UPON IT TO MOVE FOR TRANSFER.

It is undisputed that Relator timely filed its Motion to Transfer less than 60 days after it was first served with any petition related to Plaintiffs Phillip Pullen and Beverly Jo Collins-Pullen's claims. Illogically, Respondent argues that, while the motion was timely filed, Relator waived the argument that the motion was timely because Relator did not "properly raise" the argument or make it "part of the record before Respondent." This argument is both legally and factually incorrect.

A motion to transfer is either timely or untimely. Rule 51.045 provides: "If a timely motion to transfer venue is filed, the venue issue is not waived by any other action in the case." Rule 51.045(a)(2); *see also State ex rel. Vee-Jay Contracting Co. v. Neill*, 89 S.W.3d 470, 472 (Mo. 2002) (holding that upon the timely filing of a motion establishing that an action is filed in an improper venue, it is the obligation of the court to transfer the case to the proper venue). A timely filed motion cannot be "waived" simply because the moving party did not argue in its papers the self-evident fact that the motion was timely filed.

Respondent ignores the plain language of Rule 51.045 that filing preserves a venue challenge, and instead asserts that Relator waived the argument that it timely moved to transfer because Defendants did not raise the issue in the pleadings. That argument is unsupported by any rule or case law, including those cited by Respondent.

The majority of the cases to which Respondent cites hold that *when an issue is not raised at the trial court level*, it may be deemed waived. See *Howard v. City of Kansas City*, 332 S.W.3d 772, 791 (Mo. 2011) (declining to consider an issue on appeal because defendant never raised that issue at the trial court level and holding “[b]ecause the City did not argue against the submissibility of future damages in its motion for directed verdict, it has failed to preserve the issue for appeal”); *Norden v. Friedman*, 756 S.W.2d 158, 162 (Mo. 1988) (holding that a statute of frauds defense is waived when not raised in the pleadings or at trial); *Frein v. Madesco Inv. Corp.*, 735 S.W.2d 760, 762 (Mo. Ct. App. 1987) (holding that defendant waived its theory of the admissibility of evidence because it did not raise that theory at the hearing or at trial); *Stenger v. Great Southern Sav. & Loan Assoc.*, 677 S.W.2d 376, 382 (Mo. Ct. App. 1984) (holding that where plaintiffs’ reply made a general assertion that a statute was “vague, overbroad and indefinite” and at trial plaintiffs’ counsel stated that the statute was unconstitutional on the grounds “set forth in my reply”, plaintiff failed to preserve an invalidity argument for appeal); *Jones v. Church*, 252 S.W.2d 647, 648 (Mo. Ct. App. 1952) (defendants “did not make any complaint of improper venue in the court below”). None of these cases support Respondent’s argument because Respondent’s argument is nonsensical. The timeliness of Relator’s motion did not need to be stated in the pleadings because timeliness was: (1) preserved by filing the Motion to Transfer; and (2) clear from the record. Respondent had before him as part of the record the Return of Service on Relator (October 2, 2012) and Relator’s Motion to Transfer (November 15, 2012).

Moreover, unlike the cases cited by Respondent, here Relator's timeliness was indeed raised at the trial court level—during the Motion to Transfer and Motion to Enforce Transfer hearings. Respondent cites to several cases in an attempt to suggest that Relator's timeliness argument was waived because there is no transcript of the Motion to Transfer and Motion to Enforce Transfer hearings. Indeed, neither Respondent nor Plaintiffs has ever disputed the fact that Relator raised the timeliness of its motion during the hearings on Relator's Motion to Transfer and Motion to Enforce Transfer. Nevertheless, Respondent's cases simply establish that, where there is a **disagreement** about events, a court will not look beyond a recorded transcript in order to alter that transcript. *See Hendershot v. Minich*, 297 S.W.2d 403, 408-10 (Mo. 1956) (when presented with an incomplete transcript and conflicting affidavits of counsel, refusing to resolve the issue whether a party had consented to sentencing outside the county); *Chilton v. Gorden*, 952 S.W.2d 773, 777 (Mo. Ct. App. S.D. 1997) ("Except where conceded as true by the opposing party, statements asserted in the party's brief that are not supported by the record on appeal supply no basis for appellate review."); *Sams v. Green*, 591 S.W.2d 15, 18 (Mo. Ct. App. 1979) ("The appellate court will not consider post-trial recollections of what transpired at trial to complete, correct, or impeach the recorded transcript."). Here, the absence of transcripts of these hearings is a non-issue because there is **no disagreement** that the timeliness issue was raised.

Relator preserved its venue challenge by timely filing a motion to transfer and as Rule 51.045 makes clear no subsequent action can (or did) waive that challenge. The timeliness of Relator's Motion to Transfer was clear from the record before Respondent

and was raised on multiple occasions at the trial court level. Respondent has failed, time and time again, to identify any statute, rule or case that supports his claim that the timeliness issue was waived. Indeed, this Court has granted permanent writs based on arguments that were not raised in the writ briefs. *See, e.g., State ex rel. Carver v. Whipple*, 608 S.W.2d 410, 412 (Mo. banc Dec. 15, 1980) (making a preliminary writ permanent “for reasons not raised in the [writ] briefs but urged for the first time during oral argument”). Respondent erred by ruling that Relator’s Motion to Transfer Venue was not timely filed. Thus, a permanent writ of prohibition is the appropriate remedy.

II. RESPONDENT INCORRECTLY EXPLAINS THE STANDARD FOR GRANTING A WRIT OF PROHIBITION.

The Writ of Prohibition should be made permanent because the Respondent exceeded his jurisdiction and usurped the power of the St. Louis County Circuit Court when he ruled that Relator’s Motion to Transfer Venue was not timely filed. In his brief, Respondent suggests that this Court cannot grant a writ of prohibition because Relator has not established that it will suffer irreparable harm without a writ and because Relator has failed to adequately quantify that irreparable harm. This is an incorrect understanding of both the law and the facts of this case.

A writ of prohibition is available (1) to prevent a usurpation of judicial power, (2) to remedy an excess of jurisdiction, or (3) to prevent an absolute irreparable harm to a party. *See State ex rel. KCP & L Greater Mo. Operations Co. v. Cook*, 353 S.W.3d 14, 17 (Mo. Ct. App. W.D. 2011). Respondent acted outside of his jurisdiction when he held that Relator’s Motion to Transfer was untimely and found that Relator should have

moved to transfer the case over five months before Relator had been served with any petition in this matter. A permanent writ is appropriate on this fact alone. Relator also has shown that in refusing to transfer this matter to St. Louis County—the only Missouri county in which venue properly lies—Respondent usurped the judicial power of the St. Louis County Circuit Court. Again, a permanent writ is appropriate on this fact alone.

Respondent's claim that this Court has already found the factual scenario of this case insufficient to warrant prohibition is also without merit. Respondent argues that because the Court declined to issue writs of prohibition pursuant to the petitions brought by other defendants, "the logical conclusion [is that] venue was proper in the City of St. Louis, or that even though it was not, prohibition was not warranted under the circumstances." **Resp. Brief, page 11.** Respondent's logic is faulty. First, despite his urging to the contrary, Respondent seems to suggest that by declining to issue these writs this Court effectively issued a decision on the merits. Such a suggestion is wrong. Second, Respondent makes no effort to defend jurisdiction in the City of St. Louis on the merits and ignores the distinguishing fact that Relator's Motion to Transfer unquestionably was filed within 30 days after it was first served with any process in this matter. Finally, there is a far more plausible "logical conclusion" that can be drawn from this Court's decision not to issue preliminary writs to other defendants—The Court found it unnecessary to issue multiple writs, which would have the same effect, in this case.

Conclusion

For the foregoing reasons, the preliminary writ issued by the Court should be made permanent.

Respectfully Submitted,

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RELATOR SCHWARZ PHARMA, INC.'S CERTIFICATION

Signature of this filing certifies the foregoing Brief complies with the limitations contained in Rule 84.06(b). This brief contains approximately 2,258 words.

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RELATOR SCHWARZ PHARMA, INC.'S
CERTIFICATE OF SERVICE

Signature of this filing certifies the foregoing Reply was served this 25th day of November, 2013 as indicated below.

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